Supreme Court, U.S.
FILED
99 897 NOV 22 1999
OFFICE OF THE CLERK

No. _____

In the
Supreme Court of the United States
October Term, 2000

R. C. LEE, Warden,
Central Prison, Raleigh, North Carolina, and
MICHAEL F. EASLEY, Attorney General
of the State of North Carolina,
Petitioners,

v.

NORRIS CARLTON TAYLOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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6858

Capital Case

QUESTION PRESENTED

I. **WHETHER THE FOURTH CIRCUIT COURT OF APPEALS HAS IGNORED CONGRESSIONAL INTENT, AND STATE POST-CONVICTION PROCEDURAL LAW, BY HOLDING THAT THE LIMITATION PERIOD FOR FILING A PETITION FOR WRIT OF HABEAS CORPUS IS TOLLED WHEN THERE IS NO PROPERLY FILED APPLICATION FOR REVIEW PENDING BEFORE ANY STATE COURT.**

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, R. C. Lee, Warden, Central Prison, Raleigh, North Carolina, and the Honorable Michael F. Easley, Attorney General of North Carolina [hereinafter "State"], by and through their undersigned counsel, Special Deputy

Attorney General H. Alan Pell, respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

Taylor v. Lee, 186 F.3d 557 (4th Cir. 1999) (reversing and remanding to allow filing of petition for writ of habeas corpus) (App. 1a).

Taylor v. French, No. 5:97-HC-829-F (E.D.N.C., Order filed June 9, 1998) (dismissing petition for writ of habeas corpus as untimely) (App. 13a).

JURISDICTION

The jurisdiction of this Court to review the Fourth Circuit's decision of July 29, 1999, is invoked pursuant to 28 U.S.C. § 1254(1). The Fourth Circuit denied the State's Petition for Rehearing and Rehearing En Banc on August 24, 1999.

STATUTORY PROVISION

Section 2244(d) of Title 28 of the United States Code provides:

> (d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which **a properly filed application** for State post-conviction or other collateral review with respect to the pertinent judgment or claim **is pending** shall not be counted toward any period of limitation under this subsection. (emphasis added).

STATEMENT OF THE CASE

On 1 September 1978, Norris Carlton Taylor shot and killed Mildred Murchison, a woman four months pregnant. At the time he murdered Ms. Murchison, Taylor was an escapee from the Johnston County Jail, where he was being held for the

murder of Kathilene Ann Mansullo.[1] He was also a fugitive from Virginia for a series of kidnappings, robberies, assaults, and a murder.

Taylor was arrested the day of the murder. He was charged with the Murchison murder, and also kidnapping, armed robbery, and assault with a deadly weapon with intent to kill and inflicting serious injury upon Malcolm Biles, which had also occurred that day. Taylor was also charged with the 28 August 1978 kidnapping and rape of Jewel Taylor.[2]

On 10 July 1979, the jury unanimously found Taylor guilty of the murder and armed robbery of Mildred Murchison and the kidnapping, armed robbery, and assault with a deadly weapon with intent to kill inflicting serious injury of Malcolm Biles. On 30 July 1979, the same jury, after a sentencing hearing, unanimously recommended that Taylor be sentenced to death.

A. STATE APPELLATE REVIEW

On 26 November 1980, Taylor's trial/direct appeal counsel filed an appellant's brief that brought forward and argued sixty-two Assignments of Error. On 3 November 1981, the Supreme Court of North Carolina affirmed the conviction

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[1] Taylor was later convicted of the first-degree murder of Kathilene Mansullo. *State v. Taylor*, 298 N.C. 405, 259 S.E.2d 502 (1979).

[2] Taylor was later convicted of these offenses, but the North Carolina Supreme Court reversed as to the kidnapping charge. *State v. Taylor*, 301 N.C. 164, 270 S.E.2d 409 (1980).

of first degree murder and the sentence of death, and all other convictions and sentences except for the kidnapping conviction. *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981).

This Court denied Taylor's petition for a writ of certiorari on 27 June 1983. *Taylor v. North Carolina*, 463 U.S. 1213 (1983). His subsequent petition for rehearing was denied on 8 September 1983. *Taylor v. North Carolina*, 463 U.S. 1249 (1983).

B. STATE POST-CONVICTION REVIEW [3]

On 13 February 1984, Taylor filed a motion for appropriate relief [hereinafter "MAR(1)"] in the superior court. Extensive litigation then ensued, which included interlocutory review of a superior court disclosure order.

On 4 December 1992, following an evidentiary hearing, the superior court entered an order denying relief on Taylor's MAR(1).

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[3] The Fourth Circuit, in its decision, notes that "Taylor raised extensive state appellate and post-conviction challenges to his sentence before seeking federal relief." *Taylor v. Lee*, 186 F.3d at 559. Because the complete state post-conviction history is not relevant to the issue presented in this Petition, the Petitioner has set forth only the filing and decision dates on Taylor's motions for appropriate relief and petitions for certiorari review. The relevant case history is also set forth in *Taylor* decision. *Id.*

On 10 April 1993, Taylor filed a petition for a writ of certiorari in the Supreme Court of North Carolina, requesting review of the denial of his MAR(1).

On 20 April 1993, the Supreme Court of North Carolina denied Taylor's petition for writ of certiorari.

On 28 July 1993, Taylor filed a second MAR [hereinafter "MAR(2)"] in the superior court.

On 27 February 1995, Taylor filed an amended MAR(2) in the superior court and a motion for partial summary judgment.

On 16 May 1996, a hearing was held on Taylor's MAR(2), and his amendment to the Motion. On that day, the superior court denied three of the claims.

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was enacted.

On 23 May 1996, the superior court entered an order denying the remaining claims in MAR(2). The state court ordered production of a transcript of the proceedings for Taylor's benefit in filing a petition for certiorari review in the North Carolina Supreme Court.[4]

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[4] The District Court concluded that due to the judicial order, the matter was "pending" until such time as the transcript was delivered; consequently, the time from the order until final delivery of the transcript was appropriately tolled under 28 U.S.C. § 2244(d)(2). *See* argument, *infra*.

On 23 August 1996, the last of the transcript from the May hearing on MAR(2) was delivered to Taylor's counsel.

On 22 October 1996, Taylor filed a petition for writ of certiorari in the Supreme Court of North Carolina.

On 10 February 1997, the Supreme Court of North Carolina denied certiorari review of Taylor's petition. *State v. Taylor*, 345 N.C. 352, 483 S.E.2d 190 (1997).

On 9 May 1997, Taylor filed a petition for writ of certiorari in this Court.

On 6 October 1997, the Court denied certiorari review. *Taylor v. North Carolina,* 118 S. Ct. 93 (1997).

C. FEDERAL COURT REVIEW

On 6 July 1993, Taylor, through counsel, filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina, *Taylor v. Dixon,* No. 93-250-H.C.-F. In that petition, Taylor raised claims not previously presented to the state courts.

On 28 July 1993, Taylor filed MAR(2) in the superior court. On 25 August 1993, the State filed a motion to dismiss Taylor's petition for writ of habeas corpus for failure to exhaust state remedies. On 8 November 1993, Taylor's petition for writ of habeas corpus was dismissed without prejudice for failure to exhaust state remedies.

Subsequent to the state litigation on MAR(2), this Court denied Taylor's petition for certiorari review on 6 October 1997. *Taylor v. North Carolina*, 118 S. Ct. 93 (1997). As above noted, the North Carolina Supreme Court had denied certiorari review on MAR(2) on 10 February 1997. *State v. Taylor*, 345 N.C. 352, 483 S.E.2d 190 (1997).

On 2 February 1998, Taylor filed his petition for writ of habeas corpus. The State filed a motion to dismiss Taylor's petition on 18 February 1998 on the ground that it was untimely filed pursuant to 28 U.S.C. § 2244(d). The District Court dismissed the petition by Order entered on 9 June 1998. *Taylor v. French*, No. 5:97-HC-829-F (E.D.N.C., June 9, 1998) (App. 13a).

The District Court concluded that Taylor had a properly filed application for state post-conviction relief between April 24, 1996,[5] the effective date of the AEDPA, and August 23, 1996--the day Taylor received the last of the transcript from the State court hearing. The District Court found that Taylor's limitation period was tolled for this 121 day period. Further, the District Court found that Taylor also had a properly filed application for State post-conviction relief pending between October 22, 1996 (the filing date of the petition for certiorari review from the North Carolina Supreme Court) and February 10, 1997 (the date the certiorari petition was denied). This resulted in an additional 108 days during which the limitation

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[5] Taylor's MAR(2) was not denied until May 23, 1996, after the Act's enactment date.

period was tolled. Consequently, the District Court concluded that, under the provisions of AEDPA, Taylor was required to have filed his application for habeas review on or before December 9, 1997, which was 229 days after April 24, 1997. *Taylor v. French*, No. 5:97-HC-829-F (E.D.N.C. June 9, 1998) (App. 29a).

Taylor filed a motion to alter or amend the judgment of the District Court on 19 June 1998, which the District Court denied on 18 November 1998. On 18 December 1998, Taylor filed a notice of appeal and an application for a certificate of appealability in the District Court. The District Court allowed Taylor's certificate of appealability on two issues: (1) whether the District Court erred in dismissing Petitioner's habeas petition as untimely pursuant to § 2244(d) and (2) whether the District Court erred in not equitably tolling the limitations period.

The Fourth Circuit Court of Appeals reversed and remanded the District Court's dismissal of Taylor's application to allow filing. *Taylor v. Lee*,[6] 186 F.3d 557 (4th Cir. 1999). The Fourth Circuit held that the entire period of state post-conviction proceedings -- from the initial filing to final disposition by the State's highest court -- was tolled from the federal limitation period for those petitioners who were already involved in state post-conviction proceedings on April 24, 1996. *Taylor v. Lee*, 186 F.3d at 561.

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[6] Subsequent to Taylor's filing of his petition, R. C. Lee succeeded James B. French as Warden of Central Prison.

REASONS WHY THE WRIT SHOULD ISSUE

I. THE FOURTH CIRCUIT'S DECISION IGNORES THE ORDINARY MEANING OF THE WORD "PENDING," AND FAILS TO CONSIDER NORTH CAROLINA LAW, WHICH PROVIDES THAT NO ACTION IS "PENDING" IN ANY STATE COURT FOLLOWING DENIAL OF A MOTION FOR APPROPRIATE RELIEF AND PRIOR TO THE FILING OF A PETITION FOR WRIT OF CERTIORARI.

Contrary to the ordinary meaning of the word "pending," the Fourth Circuit found that Petitioner's application for post-conviction relief was pending during a period when he had no "properly filed" application for review in state court. Specifically, the Fourth Circuit held that the statutory limitation period is tolled from the initial filing until a final disposition by the highest state court. *Taylor v. Lee,* 186 F.3d 557, 561 (4th Cir. 1999).[7]

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[7] The Fourth Circuit's holding includes language which makes the application of its holding less than clear: "[U]nder § 2244(d)(2) the entire period of state post-conviction proceedings . . . is tolled from the limitations period *for federal habeas corpus petitioners who were already involved in state post-conviction proceedings on April 24, 1996." Taylor v. Lee,* 186 F.3d at 561. (emphasis added) Nevertheless, the court states that the dispute "centers on the interpretation of the word "pending" in § 2244(d)(2) of the AEDPA." *Id.* at 560.

Moreover, the decision fails to recognize North Carolina state law. In North Carolina, when a motion for appropriate relief is finally denied by the state superior court, there are no matters pending before any North Carolina court until a petition for certiorari review is filed with the Supreme Court of North Carolina. Thus, no "properly filed" application for post-conviction relief was "pending" between denial of Taylor's MAR2 and the date that he filed a subsequent petition for writ of certiorari in the Supreme Court of North Carolina.

A. ORDINARY MEANING OF PENDING.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires a state prisoner seeking federal habeas relief to file his application for relief in federal court within a one-year limitation period. The period generally commences at the later of the conclusion of direct appellate review or on April 24, 1996. *See* 28 U.S.C. § 2244(d) (1); *Brown v. Angelone*, 150 F.3d 370, 372 (4th Cir. 1998). The AEDPA ensures that a prisoner normally will not be held responsible for the time during which a state court deliberates his claim. The statute excludes, as part of the prisoners 365 days, "[t]he time during which a *properly filed* application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is *pending*." 28 U.S.C. § 2244(d)(2)(emphasisadded).

Taylor's limitation period commenced on April 24, 1996. *Taylor v. Lee*, 186 F.3d 557, 560 (4th Cir. 1999). Because Taylor had a "properly filed" application [MAR2] pending in the State Superior Court on that date, the limitation period was

tolled. On May 23, 1996, the final claims in the MAR2 were denied.

On October 22, 1996, Taylor filed his petition for writ of certiorari in the North Carolina Supreme Court. *Id.* at 559. That court denied certiorari review of Taylor's petition on February 10, 1997. *Id.* Taylor filed his federal petition for writ of habeas corpus on February 2, 1998. Thus, Taylor's petition for writ of habeas corpus was filed *more than* three hundred and sixty-five (365) days after April 24, 1996, *even excluding* (1) the days during which the state Superior Court was deliberating on his MAR2; (2) the days taken to prepare and deliver the transcript of the motion hearing; and (3) the days during which the state Supreme Court was deliberating on the petition for writ of certiorari.

(1) *Principles of Statutory Construction*

The principles guiding statutory interpretation are well-established. "[T]he meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain. . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States,* 242 U.S. 470, 485 (1917); *accord, Arnold v. United Parcel Service, Inc.*, 136 F.3d. 854, 857-58 (4th Cir. 1998). A natural reading of the statutory language is the first criterion of interpreting statutes. *United States v. Wells,* 519 U.S. 482, 490 (1997).

In reading the statute, interpreters must give operative effect to every word and clause. *Walters v. Metropolitan Educ. Enter. Inc.* 519 U.S. 202, 209 (1997). Moreover, the "statutory language must always be read in its proper context." *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991). "In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States,* 494 U.S. 152, 158 (1990).

The Fourth Circuit, in order to conclude that the limitation period had not expired, defined the statutory term "pending" both broadly and contrary to its ordinary meaning. The Fourth Circuit's construction of the word "pending" is contrary to the directive by this Court that federal courts effectuate United States Congressional intent by giving words used in a statute their ordinary meaning. *Moskal v. United States*, 498 U.S. 103, 108 (1990); *Richards v. United States,* 369 U.S. 1, 9 (1962). Certiorari is warranted in this case because the Fourth Circuit simply failed to comply with this fundamental rule of statutory construction.

The Fourth Circuit concentrates on the word "pending" in its opinion. However, there is no attempt by that court to explain its construction of "pending" *in conjunction with* the term "properly filed application." Certainly, Congress used "pending" to modify or describe the status of a *filed* document. On this ground alone, the holding appears to fly in the face of logic and common sense.

The ordinary meaning of the word "pending" in relation to the filing of an application is established in numerous cases. An action is not pending *until* an application of some sort has been filed in a court of appropriate jurisdiction. *See Hohn v. United States*, 524 U.S. 236, ___, 118 S. Ct. 1969 1972 (1998) (application for certificate of appealability); *McFarland v. Scott*, 512 U.S. 849, 856 (1994) (application for appointment of counsel); *Calderon v. United States District Court (Kelly)*, 163 F.3d 530, 540 (9th Cir. 1998) (same), *cert. denied*, ___U.S.___, 119 S. Ct. 1377 (1999). Accordingly, pursuant to the ordinary meaning of the word "pending," Taylor had no post-conviction application filed in any court after denial of his MAR2 and before the filing of his petition for writ of certiorari.

The Fourth Circuit leapt to its conclusion by reference to other circuit courts of appeal, which have held that the federal statutory limitation period "must" be construed broadly. *Barnett v. Lemaster*, 167 F.3d 1321, 1323 (10th Cir. 1999)(the term "pending" *must* be construed more broadly to encompass all of the time that a petitioner is attempting to exhaust state remedies), as cited in *Taylor v. Lee*, 186 F.3d at 560-61; *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999) (time must be tolled for the entire period in which a petitioner is pursuing state remedies). There is no explanation "why" the term must be construed more "broadly"; nor how a petitioner who has no pending application for review is "attempting" or "pursuing" state remedies.

The only apparent reason why the statute "must" be construed so broadly is to formulate a rule which

accommodates a more facile calculation of the period of time in which a state post-conviction proceeding is "pending." It is simpler to calculate when an application is first filed and when the state's highest court denies it. However, the federal laws should not -- must not -- be construed merely to achieve the goal of "administrative ease" in the application of such laws. *See Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 429 (6th Cir. 1998) (quoting *Lukman v. Director, OWCP*, 896 F.2d 1248, 1253 (10th Cir. 1990) ("'[e]fficiency' no matter how desirable, is not a justification for rewriting the statute and regulations . . . [Courts] must simply apply the statutes and regulations as they stand.")).

The District Court was able to use clearly established dates, filing dates and denial dates in concluding that the Petition was untimely filed. The Fourth Circuit states that the District Court may have been inconsistent in its ruling. It points to the fact that the lower court tolled the period in which the Petitioner was waiting for the completion and transmittal of the transcript of the motion hearing. This appears, at first glance, to be inconsistent with the statute, *i.e.*, a tolled period of time in which there was no application pending. *See Taylor v. Lee*, 186 F.3d at 561 ("[u]nfortunately, the gap theory does not allow for tolling of events such as transcript preparation.")

However, "[t]ime limitations analogous to a statute of limitations are subject to equitable modifications such as tolling, . . . which 'stops the running of the statute of limitations in light of established equitable considerations. . . . '" *Miller v. New Jersey State Dept. of Corrections*, 145 F.3d 616, 617 (3d

Cir. 1998) (cit. omitted) (quoting *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1125 (3d Cir. 1997)). The *Miller* court, after an analysis of the legislative history, concluded that Congress intended the limitation period in Section 2244(d)(1) to be a statute of limitation, as opposed to a jurisdictional limitation, and consequently subject to equitable tolling.

The Fourth Circuit found that the transcript was both a necessary part of the trial court record, and that the time required for the State to prepare and deliver the transcript is a matter completely out of a prisoner's control. *Taylor v. Lee*, 186 F.3d at 561. Thus, it is proper to equitably toll the transcript preparation time.[8] Further, the District Court concluded that because the trial court "granted" the request for the transcript, the matter was "pending" until such time as the transcript was delivered. Under either legal theory, the result remains the same -- Taylor's petition was filed more than three hundred and sixty-five (365) days after April 24, 1996.[9]

The Fourth Circuit's apparent concern is that the ordinary interpretation of pending would coerce the prisoner to file

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[8] The State, in its brief before the Fourth Circuit, did not abandon its general position that transcript preparation time should not be tolled but stated that the District Court could have equitably tolled the transcript preparation time in this case.

[9] The federal law for those states having a qualifying unitary review procedure provides that the limitation period is tolled until a transcript is made available. Sec. 2265(c), AEDPA.

unexhausted habeas petitions in federal court. The decision attempts to construe the word "pending" in a manner which will prevent protective filings. *Taylor,* 186 F.3d at 561. In other words, the Fourth Circuit's decision is based on the requirement that state prisoners exhaust their state remedies before coming to federal court. *Id.*

The requirement of exhaustion of state remedies does not compel an interpretation of pending in a manner inconsistent with its ordinary meaning. Section 2244(d)(2) provides for exhaustion of state remedies. The tolling events found there, however, were not designed to facilitate dilatory exhaustion. While *O'Sullivan v. Boerckel* , ___ U.S. ___, 119 S. Ct. 1728 (1999), holds that state prisoners must exhaust state remedies before proceeding to federal court, it *never* implies that state prisoners may do so at their leisure.

The legislative history reflects that Congress was not intending to "persuade" state prisoners to comply with the independent requirements of (1) exhausting all claims in state court prior to coming to federal court, and (2) filing a federal petition within 365 days from completion of direct review. Congress, instead, passed an "effective" death penalty act with incentives for compliance with filing requirements. Thus, if a prisoner has not exhausted his state remedies, his claims simply will not allow him relief in federal court. 28 U.S.C. § 2254(b); *O'Sullivan v. Boerckel* , ___ U.S. ___, 119 S. Ct. 1728 (1999). Also, and *independently*, if a prisoner wastes so many of his 365 days that, when he finally begins the exhaustion process,

his time runs out while exhausting, then he simply cannot come to federal court at all. 28 U.S.C. § 2244(d).

Moreover, the Fourth Circuit's interpretation ignores that § 2244(d) applies to non-capital habeas petitioners without distinction. It is inevitable that prisoners will delay commencement of state exhaustion proceedings until only a few of the 365 days remain. Surely Congress intended *the majority* of habeas petitioners to also diligently pursue state court remedies. North Carolina Appellate Rule 21(c) provides, in pertinent part, that "[t]he petition [for writ of certiorari] shall be filed without unreasonable delay[.]" This open-ended time frame may well lead to non-capital defendants waiting years before filing certiorari petitions.

Thus, in North Carolina, there simply is no concrete deadline for filing a petition for writ of certiorari for non-capital petitioners. If a prisoner decided not to file a petition for writ of certiorari, the federal habeas courts would be required to read his mind to determine when his MAR was no longer "pending." At the very least, the federal habeas courts would have to analyze, pursuant to North Carolina law, the bounds of a "reasonable" amount of time on a case-by-case basis.[10]

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[10] The application of 28 U.S.C. § 2244(d)(2) in a non-capital case is addressed in *Nino v. Galaza, et al.*, 183 F.3d 1003 (9th Cir. 1999), *petition for cert. filed*, ___U.S.L.W.___(U.S. Nov. ___, 1999)(No. ____).

The Fourth Circuit also based its decision on concerns for comity. *Taylor*, 186 F.3d at 561. The AEDPA provides for comity. First, no federal court may overturn a state conviction without the state courts having had the opportunity to correct the constitutional violation in the first instance. 28 U.S.C. § 2254(b). Second, the AEDPA gives the State the statutory ability expressly to waive exhaustion if they so desire. 28 U.S.C. § 2254(b)(3). Thus, defining the word "pending" by its natural and common meaning will not place comity at risk. The Fourth Circuit's decision merely serves to forgive a petitioner who has squandered his time before commencing exhaustion. The decision may actually invite state prisoners to abuse the state post-conviction system by providing the incentive to make interminable filings to ensure tolling.

(2) *Legislative Intent*

Significant by its absence from the Fourth Circuit's decision is a single reference to the statute's legislative history or an analysis of legislative intent. This is somewhat remarkable in light of the fact that the case was one of first impression and the issue was construction of a statutory term. A review of the statute's history reveals that a rule which would have allowed a court to look to the filing date of an action in state court, and then to the final disposition of a claim by the State's highest court, *could* have been written into law -- but wasn't. When Congress enacted the limitation period in the AEDPA, it specifically *rejected* the interpretation set forth by the Fourth Circuit in *Taylor v. Lee*.

In the House of Representatives's version of the AEDPA, the following language with regard to "Special Habeas Corpus Procedures in Capital Cases" appeared:

> § 2258. Filing of habeas corpus petition; time requirements; tolling rules
>
> ***
>
> (2) during any period in which a State prisoner under capital sentence has a properly filed request for postconviction review pending before a State court of competent jurisdiction; if all State filing rules are met in a timely manner, *this period shall run continuously from the date that the State prisoner initially files for postconviction review until final disposition of the case by the highest court of the State*, but the time requirements established by this section are not tolled during the pendency of a petition for certiorari before the Supreme Court except as provided in paragraph (1)[11];

H.R. 729 (1st Sess. 1995) (emphasis added). The final language of the bill, as to the tolling of the limitation period, reads: "*from the date* on which the first petition for post-conviction review or other collateral relief *is filed until the final state court disposition* of such petition . . . ." S. 735, Sec. 2263(b) (2), AEDPA. (emphasis added)

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[11] Paragraph 1 referred to the filing of a certiorari petition in the United States Supreme Court after direct review.

Thus, Congress made it clear that the entire period was tolled in relation only to those cases involving a sentence of death from any state having a qualifying unitary review procedure. Section 2265, AEDPA. The reason for a different tolling period for those states which have "opted-in" to the unitary review procedure is apparent: the limitation period is only 180 days for the filing of the petition for writ of habeas corpus. Sec. 2263(a), AEDPA. Consequently, it makes perfect sense that the entire period, from initial filing to final disposition, would be tolled. Where the limitation period is 365 days, however, Congress provided an incentive to expeditious filing by providing tolling *only* when an application for review had been properly filed.

If Congress had wanted the tolling provisions to be calculated the same for all states, it would have included the appropriate language from Section 2263 of the Act into 28 U.S.C. § 2244(d) (2). Thus, the Fourth Circuit has erroneously engrafted the tolling provision from another section of the Act, applicable to the unitary review procedure with its 180 day limitation period, into 28 U.S.C. § 2244(d) (2).

Further, the Fourth Circuit's interpretation of § 2244(d) reads state post-conviction review as a seamless procedure, similar to conviction and direct appeal. Congress recognized the difference, however, and specifically treated the limitation periods differently. In § 2244(d)(1)(A), Congress states that the limitation period begins to run on "the date on which the judgment became final by the conclusion of direct review *or*

the expiration of the time for seeking such review." *Id.* (emphasis added).

If Congress had intended § 2244(d)(2) to be tolled as the Fourth Circuit concluded, *i.e.*, from filing until "conclusion" of the post-conviction process, Congress would have used the specific language present in § 2244(d)(1)(A), instead of requiring that there be a *pending application* for review. "Where Congress includes particular language in one section of an act but omits it in another section of the same act, it is presumed that Congress intended to exclude the language, and language will not be implied where it has been excluded." *Gendron v. United States*, 154 F.3d 672, 674 (7th Cir. 1998), *cert. denied*, ___U.S.___, 119 S. Ct. 1758 (1999).

(3) *Summary*

In 28 U.S.C. § 2244(d)(2), Congress *did not* provide that time would be tolled "from the date on which the first petition for post-conviction review or other collateral relief is filed until the final state court disposition" -- the language in the final bill for states that opt-in for the unitary review procedure. Consequently, the Fourth Circuit has "enacted" the "opt-in" limitation period for all cases by judicial fiat and usurped the authority of the legislative and executive branches.

Congressional intent, as noted by the District Court opinion below, was to "curb the lengthy delays in filing that now often occur in federal habeas corpus litigation, while preserving the availability of review when a prisoner *diligently*

pursues state remedies and applies for federal habeas review in a timely manner." *Taylor v. Lee,* slip op. at 9-10 (E.D.N.C. June 9, 1998) (quoting H.R. Rep. No. 104-23 (1st Sess. 1995) at 9-10) (emphasis added). Accordingly, the District Court properly interpreted the limitation statute because its construction of statutory terms conforms to the plain reading of the statute and is consistent with congressional intent.

The Fourth Circuit decided this important question of federal law by both failing to accord the ordinary meaning to the terms used in 28 U.S.C. § 2244(d), and by failing to consider the legislative history and intent of the framers. Thus, certiorari is warranted in that the Fourth Circuit decided the question in a manner which conflicts with this Court's relevant decisions, S. Ct. R. 10(c), and in a manner which calls for the exercise of this Court's supervisory power, S. Ct. R. 10(a).

B. North Carolina Post-Conviction Procedure.

The Fourth Circuit's decision also fails to acknowledge a salient aspect of habeas review: federal recognition of the individual state court rules and statutes. *See Coleman v. Thompson*, 501 U.S. 722 (claim is procedurally barred in federal court for petitioner's failure to comply with state court filing deadline), *reh'g denied*, 501 U.S. 1277 (1991). Separate states have differing post-conviction rules and processes in determining whether a claim has been exhausted. *Compare Brown v. North Carolina*, 341 F.2d 87 (4th Cir. 1965) (analysis of North Carolina's habeas corpus relief) *with Durkin v. Davis*,

538 F.2d 1037 (4th Cir. 1976) (analysis of Virginia's procedure for habeas corpus relief). Additionally, when a federal court reviews an "adequate and independent" state ground for procedural bar, that review necessitates consideration of the individual state's statutes. *See O'Sullivan v. Boerckel*, ___U.S. at ___, 119 S. Ct. at 1729 (Court review of Illinois' established post-conviction review procedure establishes that petitioners have a right to raise claims before the state supreme court, and "[t]hat is all § 2254(c) requires."); *see also Ashe v. Styles* 39 F.3d 80, 87 (4th Cir. 1994) (discussion of North Carolina's state procedural bar statute).

Because a limitations period is also a "procedural bar," the federal courts should consider the individual state's post-conviction process to determine whether a "properly filed application" is "pending." *Cf. O'Sullivan v. Boerckel*, 119 S. Ct. at 1732-33 (comity requires petitioner to use State's established appellate review procedures before presenting claims to a federal court; three claims not included in the petition for discretionary review to state's highest court held procedurally defaulted).

In North Carolina, a prisoner *does not* have a case or matter pending before *any* State court following the denial of his motion for appropriate relief. *State v. Green*, 350 N.C. 400, 514 S.E.2d 724, 727-29, *cert. denied*, ___S. Ct.___, 1999 WL 731746 (U.S. Sept. 24, 1999). In *Green*, the state Superior Court denied Green's motion for appropriate relief on May 1, 1996. *Green*, 350 N.C. at 402, 514 S.E.2d at 726. On June 21, 1996, the General Assembly of North Carolina enacted N.C.

GEN. STAT. §15A-1415(f), a post-conviction disclosure statute applicable only to capital cases.[12] On the statute's enactment date, Green still had time to file a petition for a writ of certiorari to the Supreme Court of North Carolina from the denial of his motion for appropriate relief.[13] However, *Green* did not file his petition until July 12, 1996, making it both an untimely filed petition *and* a petition filed subsequent to the effective date (June 21, 1996) of N.C. GEN. STAT. §15A-1415(f). Green later sought discovery pursuant to N.C. GEN. STAT. §15A-1415(f), raising the issue of whether the statute was to be retroactively applied.

The Supreme Court of North Carolina held, *inter alia*, that the disclosure provisions of N.C. GEN. STAT. §15A-1415(f) applied to petitioners who had a case [petition] "pending" before the court on June 21, 1996. The court ruled that because Green's motion for appropriate relief was final on May 1, 1996, N.C. GEN. STAT. §15A-1415(f) did not apply to him. *Green*, 350 N.C. at 408, 514 S.E.2d at 727-28. Further, the fact that on June 21, 1996, Green could still file a petition for writ of

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[12] N.C. GEN. STAT. §15A-1415(f) provides a capital defendant with statutory access to the State's investigative and prosecutorial files for the filing of a motion for appropriate relief.

[13] Pursuant to Rule 21(f) of the North Carolina Rules of Appellate Procedure, *Green* had sixty days from the delivery of the transcript of the motion for appropriate relief hearing to file a petition for writ of certiorari. If no transcript is prepared, customarily, defendants will have sixty days from denial of the motion for appropriate relief to file a petition for writ of certiorari in the Supreme Court of North Carolina.

certiorari in the Supreme Court of North Carolina did not persuade that court to hold that his motion for appropriate relief was still "pending." As the Supreme Court of North Carolina succinctly stated, "[o]n June 21, 1996, defendants case was beyond the jurisdiction of the trial court *and not pending before any other court of this state*." *Id.* at 408, 514 S.E.2d at 729 (emphasis added).

Taylor's case has a similar post-conviction procedural history. Like Green, Taylor's MAR2 was finally denied before June 21, 1996, even though he could still file a timely petition for writ of certiorari on that date. Like Green, Taylor later petitioned for a writ of certiorari in the Supreme Court of North Carolina after the effective date of the disclosure statute. Like Green, Taylor later returned to state court after his state post-conviction proceedings had concluded to file a motion for discovery pursuant to N.C. GEN. STAT. §15A-1415(f). The state Superior Court denied Taylor's motion for discovery, and Taylor then petitioned the Supreme Court of North Carolina for a writ of certiorari seeking review of this denial. Following the *Green* decision, the Supreme Court of North Carolina summarily denied Taylor's petition for writ of certiorari. *State v. Taylor*, ___ N.C. ___, ___ S.E.2d ___, 1999 WL 615291 (July 23, 1999).

In *State v. Green*, the Supreme Court of North Carolina set forth the law in North Carolina concerning when a post-conviction capital case was "pending" before the state courts:

> For purposes of applying the discovery provisions of new subsection (f) [of N.C. GEN. STAT. § 15A-1415], we conclude that those provisions apply retroactively to post-conviction motions for appropriate relief in capital cases, but only when such motions were filed before 21 June 1996 and had been allowed or were still pending on that date. In this context, the term "pending" means that on 21 June 1996 a motion for appropriate relief *had been filed* but had not been denied by the trial court, or the motion for appropriate relief had been denied by the trial court but the defendant *had filed a petition for writ of certiorari* which had been allowed by, or was still before, this Court.

State v. Green, 350 N.C. at 406, 514 S.E.2d at 728 (emphasis added). Thus, the Fourth Circuit, in addition to failing to accord the ordinary meaning of the words "properly filed application . . . pending" in the state courts, failed to recognize North Carolina procedural law in applying the statute. Pursuant to the holding in *Green*, and as a matter of North Carolina post-conviction procedural law, Taylor had no properly filed application for state post-conviction relief "pending" in the interval between the denial of his motion for appropriate relief and his petition for writ of certiorari.

The terminology employed in the drafting of the limitation statute, *e.g.*, *properly* filed application, reflects Congressional intent to expressly recognize the various states' post-conviction and collateral review statutes. Regardless of the post-

conviction appellate procedure employed by the states, a state may calculate those periods of time where a *filed* application for relief is pending before any state court. There can also be little doubt that the term "properly filed" was directed towards nullifying the use of frivolous and interminable filings in state court as delay tactics to thwart an expeditious review of claims by the federal courts.

Congress mandated that an application be "pending" before a state court in order to toll the federal limitation period. Because the expeditious review of federal claims by the state courts prior to federal review is clearly the desired goal of the legislation, it is paradoxical that the federal courts should read 28 U.S.C. § 2244(d)(2) so as to toll the federal limitation period during a time period when *there are no such claims being reviewed* by any State court.

In summary, certiorari is warranted in that the Fourth Circuit construed 28 U.S.C. § 2244(d)(2) in a manner which conflicts with this Court's relevant decisions, S. Ct. R. 10(c), and in a manner which calls for the exercise of this Court's supervisory power, S. Ct. R. 10(a).

CONCLUSION

For the foregoing reasons, the State respectfully prays and requests that a writ of certiorari issue to review the decision of the Fourth Circuit allowing Norris Carlton Taylor to file his Petition for Writ of Habeas Corpus.

Respectfully submitted,

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November 22, 1999

APPENDIX

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Taylor v. Lee, 186 F.3d 557 (4th Cir. 1999)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-36

NORRIS CARLTON TAYLOR,

Petitioner - Appellant,

versus

R. C. LEE,* Warden of Central Prison, Raleigh, North Carolina,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Fox, District Judge. (CA-97-829-5-HC-F)

Argued: May 5, 1999
Decided: July 29, 1999

Before ERVIN, WILKINS, and KING, Circuit Judges.

Reversed and remanded by published opinion. Judge Ervin wrote the opinion, in which Judge Wilkins and Judge King joined.

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* Taylor named James B. French, former warden of Central Prison where Taylor is incarcerated, as Respondent in his petition. Subsequently, R. C. Lee succeeded French as Warden at that institution.

Taylor v. Lee Opinion, cont'd

ARGUED: James Richard Glover, GLOVER & PETERSEN, P.A., Chapel Hill, North Carolina; Gretchen Marie Engel, CENTER FOR DEATH PENALTY LITIGATION, Durham, North Carolina, for Appellant. Kendrick C. Fentress, Assistant Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee. ON BRIEF: Michael F. Easley, Attorney General of North Carolina, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee.

ERVIN, Circuit Judge:

The question before this Court is how to calculate the limitations period for federal habeas corpus petitioners who were in the middle of state post-conviction proceedings when the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was signed. *See* 28 U.S.C.A. § 2244(d)(2) (West Supp. 1999).

Norris Carlton Taylor ("Taylor") is on death row in North Carolina for murder. When the AEDPA was signed on April 24, 1996, Taylor was still undergoing state post-conviction proceedings. After exhausting his state remedies, Taylor filed a federal petition for a writ of habeas corpus in district court.

The district court dismissed Taylor's petition as barred

by the statute of limitations. It did not toll a gap in time between stages of Taylor's state proceedings from Taylor's limitations period. Taylor disputed the district court's calculations. He asserted that the entire period of state post-conviction proceedings, from start to finish, should be tolled.[1] Agreeing that the district court should have tolled the entire period of state post-conviction proceedings, we reverse the dismissal and remand to allow the filing of Taylor's petition.

I.

On July 10, 1979, a North Carolina jury found Taylor guilty of the murder and armed robbery of Mildred Murchison and the kidnapping, armed robbery, and assault with a deadly weapon with intent to kill of Malcolm Biles. On July 30, 1979, that same jury recommended that Taylor be sentenced to death. The North Carolina Superior Court judge then sentenced Taylor to death for Murchison's murder and to consecutive terms of imprisonment for the non-capital offenses.

For the next fourteen years, Taylor raised extensive state appellate and post-conviction challenges to his sentence

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1 Taylor also argued on appeal that the district court should have tolled the period of time he took to seek certiorari review from the U.S. Supreme Court. Because our holding tolling the entire period of his state post-conviction proceedings is sufficient to allow Taylor to refile his petition, we do not address this issue.

before seeking federal relief. Starting with Taylor's application for federal relief, the relevant procedural history is summarized below:

July 6, 1993	Taylor filed his first federal petition for a writ of habeas corpus.
July 28, 1993	Taylor filed his second motion for appropriate relief ("MAR") in North Carolina Superior Court.
November 8, 1993	The federal district court dismissed Taylor's first petition without prejudice for failure to exhaust state remedies.
April 24, 1996	The AEDPA was signed into law.
May 16, 1996	The North Carolina Superior Court denied three of Taylor's claims in his MAR.
May 23, 1996	The North Carolina Superior Court denied the remainder of Taylor's claims in his MAR. August 23, 1996 The transcript of the North Carolina Superior Court proceedings was completed and delivered to Taylor's counsel.

Taylor v. Lee Opinion, cont'd

October 22, 1996	Taylor filed a petition for a writ of certiorari in the Supreme Court of North Carolina.
February 10, 1997	The Supreme Court of North Carolina issued an order reaching the merits of one of Taylor's claims, finding harmless error, and denying certiorari.
May 9, 1997	Taylor filed a petition for a writ of certiorari in the U.S. Supreme Court.
September 8, 1997	The last day for Taylor to file a habeas petition as argued by the State.
October 6, 1997	The U.S. Supreme Court denied certiorari.
December 9, 1997	The last day for Taylor to file a habeas petition as decided by the federal district court. The district court tolled an additional 121 days from the State's calculation to account for the transcript preparation.
February 2, 1998	Taylor filed his second federal petition for a writ of habeas corpus in federal district court.

Taylor v. Lee Opinion, cont'd

February 18, 1998	The State of North Carolina moved to dismiss Taylor's petition as untimely.
June 9, 1998	The federal district court granted the State's motion and dismissed Taylor's second petition as untimely.
December 18, 1998	Taylor filed a notice of appeal and an application for a certificate of appealability.
January 14, 1999	The federal district court issued a Certificate of Appealability as to (1) whether the district court erred in dismissing Taylor's petition as untimely pursuant to 28 U.S.C.A. § 2244(d) and (2) whether the district court erred in its calculation of the limitations period.

II.

Taylor made two arguments on appeal. First, Taylor argued that the AEDPA should not apply to his case because his first federal petition for a writ of habeas corpus was dismissed without prejudice before the AEDPA was signed into law. Second, Taylor contended that the entire period of his state post-conviction proceedings should have been tolled from the limitations period of his second petition. The construction of a

statute is a question of law that we review *de novo*. *See Shafer v. Preston Mem'l Hosp. Corp.*, 107 F.3d 274, 277 (4th Cir. 1997).

A.

The threshold issue is whether the AEDPA applies to the current appeal. This Court has held that any federal petition for a writ of habeas corpus filed after the signing of the AEDPA on April 24, 1996 is governed by the AEDPA. *See Brown v. Angelone*, 150 F.3d 370, 372 (4th Cir. 1998). Although Taylor filed his first habeas petition on July 6, 1993, before the adoption of the AEDPA, this first petition was dismissed without prejudice by the district court because Taylor had not yet exhausted his state remedies. It specifically instructed Taylor in its order that he "must institute a new action as the instant case is closed." Taylor initiated such a new action only with his second habeas petition. Since he filed his second petition on February 2, 1998, well after the signing of the AEDPA on April 24, 1996, the AEDPA applies in this case. *Accord Graham v. Johnson*, 168 F.3d 762, 775-77 (5th Cir. 1999) (rejecting a similar argument).

B.

The second issue concerns the construction of Taylor's limitations period. We have already held that petitioners like Taylor who were still undergoing state post-conviction

proceedings on April 24, 1996, had until April 23, 1997, under the AEDPA, to file a federal habeas petition. *See Brown*, 150 F.3d at 375-76. Both sides agree that the periods of time when Taylor's post-conviction filings were actually before a state court should be tolled from Taylor's limitations period. They disagree, however, over the period of time in between the North Carolina Superior Court's denial of Taylor's second MAR and Taylor's filing of a petition for a writ of certiorari from the North Carolina Supreme Court.

This dispute centers on the interpretation of the word "pending" in § 2244(d)(2) of the AEDPA.[2] The State of North Carolina argued, and the district court agreed, that Taylor's state application for post-conviction review was "pending" only until the North Carolina Superior Court denied his second MAR. The State argued that the period of time between when the MAR was denied and when Taylor filed a petition for writ of certiorari from the North Carolina Supreme Court (152 days) should not be tolled. According to the State's calculation, Taylor's last day to file a habeas petition was September 8,

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2 Section 2244(d)(2) of the AEDPA reads in relevant part:

> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C.A. § 2244(d)(2) (emphasis added).

1997. The district court accepted the State's analysis, except that it tolled an additional 121 days to account for the State's transcript preparation, finding that "even themost diligent of state prisoners cannot prevent delays in the preparation of a transcript." The district court ultimately held that December 9, 1997, was Taylor's last day to file a habeas petition.

According to our research, of the federal appellate courts, only the Ninth and the Tenth Circuits have directly addressed this issue.[3] Both circuits have interpreted § 2244(d)(2) to toll the entire period of post-conviction proceedings. *See Nino v. Galaza*, No. 98-55563, 1999 WL 451783, at *1; 1999 U.S. App. LEXIS 14966, at *1 (9th Cir. July 6, 1999) ("We conclude that . . . the time must be tolled for the entire period in which a petitioner is appropriately pursuing and exhausting his state remedies."); Barnett v. Lemaster, 167 F.3d 1321, 1323 (10th Cir. 1999) ("We conclude [that] the term ['pending'] must be construed more broadly to encompass all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court

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3 In similar cases, the First and Eleventh Circuits tolled the entire period of state post-conviction proceedings when calculating limitations periods for specific petitioners. *See Gaskins v. Duval*, No. 97-2051, 1999 WL 447129, at *2 n.2; 1999 U.S. App. LEXIS 15061, at *4 n.2 (1st Cir. July 7, 1999) (observing that not tolling the gap in time would not have altered the disposition of the case); *Guenther v. Holt*, 173 F.3d 1328, 1331 (11th Cir. 1999) (tolling the entire period of time from the initial state post-conviction petition to the denial of certiorari by the Alabama Supreme Court).

remedies. . . .").

While not directly addressing this issue, the Supreme Court recently reinforced the Ninth and Tenth Circuits' reasoning. In *O'Sullivan v. Boerckel*, the Supreme Court held that a habeas petitioner must "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." 526 U.S. , ---, 119 S. Ct. 1728, 1732 (1999).

In contrast, our research indicates that the only court to adopt the State's "gap theory" in a published opinion is a district court in the Middle District of North Carolina. *See Moseley v. French*, 961 F. Supp. 889, 892 (M.D.N.C. 1997) ("The one-year period is given for the very purpose of preparing petitions, motions, etc. and, therefore, cannot be considered a tolling event."). In the current case, the district court's tolling of the additional 121 days for transcript preparation was not consistent with Moseley because that period was for the very purpose of preparing a motion.

After review, we find the reasoning of our sister Ninth and Tenth Circuits persuasive. We reject the gap theory for two reasons.

First, we agree with the district court that a transcript "is often a necessary part of the trial court record filed for appellate review" and that "the time required for the State to prepare and

deliver the transcript" is "a matter completely out of a prisoner's control." Unfortunately, the gap theory does not allow for tolling of events such as transcript preparation.

Second, we believe that tolling the entire period of state proceedings upholds "the principle of comity that underlies the exhaustion doctrine." *Murray v. Carrier*, 477 U.S. 478, 489, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986). *See Gaskins*, 1999 WL 447129, at *2; 1999 U.S. App. LEXIS 15061, at *5 ("Applying the tolling provision encourages respect for the principle of comity and compliance with the requirement that, ordinarily, a state prisoner must first exhaust his state court remedies before seeking federal habeas relief."). We agree with the Ninth Circuit that a "contrary construction would be antithetical to the entire theory of state remedy exhaustion and would inevitably lead to the filing of protective federal petitions." Nino, 1999 WL 451783, at *2; 1999 U.S. App. LEXIS 14966, at *6.

We therefore hold that under § 2244(d)(2) the entire period of state post-conviction proceedings, from initial filing to final disposition by the highest state court (whether decision on the merits, denial of certiorari, or expiration of the period of time to seek further appellate review), is tolled from the limitations period for federal habeas corpus petitioners who were already involved in state post-conviction proceedings on April 24, 1996.

III.

We reverse the district court's dismissal of Taylor's petition for a writ of habeas corpus and remand to allow filing.

REVERSED AND REMANDED

Order of The Honorable James C. Fox,
United States District Court Judge,
June 8, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:97-HC-829-F

NORRIS CARLTON TAYLOR,)
Petitioner,)
)
V.) ORDER
)
JAMES B. FRENCH, Warden of)
Central Prison, Raleigh, N.C.)
Respondent.)

This matter is before the court on the State's Motion to Dismiss the petition as untimely. The Petitioner has responded to the State's motion, the State has replied, and the matter is ripe for disposition.

I.

On July 10, 1979, in New Hanover County Superior Court, a jury unanimously found the Petitioner, Norris Taylor, guilty of the murder and armed robbery of Mildred Murchison (who

was four months pregnant) and the kidnapping, armed robbery, and assault with a deadly weapon with intent to kill inflicting serious injury of Malcolm Biles. On July 30, 1979, the same jury, after a sentencing hearing, unanimously recommended that Taylor be sentenced to death. North Carolina Superior Court Judge Robert L. Gavin sentenced Taylor to death for Murchison's murder, and to consecutive terms of imprisonment for the non-capital offenses. After and during extensive state appellate and post-conviction challenges to his sentence, Petitioner initiated a federal habeas proceeding in this court on July 6, 1993, with the filing of a Petition for Writ of Habeas Corpus. Upon motion of the State, this court dismissed the Petition on November 8, 1993, without prejudice as a "mixed" petition, in order that Petitioner might exhaust state remedies on his unexhausted claims. *See Taylor v. Dixon*, 93-250-HC-F (E.D.N.C. Nov. 5, 1993) (Fox, J.) (unpublished).

Prior to the entry of this court's 1993 order, on July 28, 1993, Petitioner had filed a Motion for Appropriate Relief ("MAR") in the Cumberland County Superior Court. Nearly three years after Taylor filed his MAR, the State, on March 21, 1996, filed an answer to the motion. Prior to the filing of the State's answer, Petitioner, on February 25, 1996, filed an amendment to his MAR, as well as a motion for summary judgment. Petitioner's MAR was heard in the North Carolina Superior Court on May 16 and 23, 1996. By order of May 23, 1996, the state court denied all relief. The court ordered

production of a transcript of the proceedings so that the Petitioner could file a petition for certiorari with the North Carolina Supreme Court, and set an execution date of August 9, 1996. Counsel for the State and Petitioner agreed that the transcript was necessary for further proceedings. On July 16, 1996, Petitioner, still awaiting production of the transcript, moved the Superior Court of Cumberland County for a stay of execution, which the Superior Court entered on July 31, 1996. The court ordered that Petitioner file a petition for writ of certiorari in the Supreme Court of North Carolina within 60 days of receipt of the transcript.

On August 23, 1996, the last of the May hearing transcript was delivered to counsel. Petitioner timely filed a certiorari petition in the North Carolina Supreme Court on October 22, 1996. Review was denied by order of the Supreme Court filed on February 10, 1997. Petitioner refiled his Petition for Writ of Habeas Corpus on February 2, 1998.

II.

The State contends that Taylor's Petition for Writ of Habeas Corpus should be dismissed because it was not filed within the statute of limitations period codified in 28 U.S.C. § 1244(d).[1] According to the State, the one-year limitations

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1 Because North Carolina has not adopted the various standards required under 28 U.S.C. §§ 2261-2266 for capital defendants,

Order of The Honorable James C. Fox,
United States District Court Judge, cont'd

period in this case commenced on April 24, 1996, the date the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") was enacted, because Petitioner was convicted before that date. The State acknowledges that the tolling provision contained in § 2244(d)(2) applies to time that a "properly filed application" for state post-conviction review is pending. The State also acknowledges that Petitioner's properly filed application for state post-conviction review, the MAR filed on July 28, 1993, was pending in the trial court on April 24, 1996.

However, according to the State, Petitioner's application for post-conviction review was "pending" only until the date his relief on his MAR was denied by the trial court. Thus, the State asserts that the statute of limitations was tolled pursuant to § 2244(d)(2) from April 24, 1996, the effective date of the AEDPA, until May 23, 1996, the date the MAR was denied. The State argues that tolling of the statute of limitations did not begin again until Petitioner filed his certiorari petition seeking review of the trial court's denial of Petitioner's MAR with the North Carolina Supreme Court on October 22, 1996. The limitations period then was tolled while the certiorari petition was being considered by the North Carolina Supreme Court until review was denied on February 10, 1997. In other words, treating the consideration of the MAR by the trial court and the certiorari petition by the Supreme Court as separate

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this case does not come under the expedited procedures for capital defendants of Chapter 154 of the AEDPA.

Order of The Honorable James C. Fox,
United States District Court Judge, cont'd

applications for post- conviction review, the State contends that Petitioner had no application for post-conviction relief "pending" during the time between the date of denial of his MAR in the trial court and the date of the filing of his certiorari petition in the appellate court, and that this time counts against the one year federal time limit. By adding this time to the time running after the date of denial of certiorari review by the North Carolina Supreme Court, the State concludes that the one year limitations period expired on September 8, 1997, and that Petitioner's habeas application was outside the time limit because it was first filed on February 2, 1998.

In support of this argument, the State cites a recent decision by the United States District Court for the Middle District of North Carolina, *Moseley v. French,* 961 F. Supp. 889 (M.D.N.C. 1997). In *Moseley*, Magistrate Judge Russell A. Eliason considered whether a state capital prisoner had filed a timely habeas petition. The court explained:

> Petitioner urges the Court to consider the state post-conviction petition and supreme court certiorari proceedings as one process in order to exclude preparation time for the certiorari petition.... [However] the one year period expresses Congress' judgment on the amount of time reasonably necessary to file the state and federal post-

Order of The Honorable James C. Fox,
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> conviction motions. The one-year period is given for the very purpose of preparing petitions, motions, etc. and, therefore, cannot be considered a tolling event.

Moseley, 961 F. Supp. 892. Thus, in calculating Moseley's deadline for filing a petition for writ of habeas corpus, the Middle District held that because Moseley had been convicted before the effective date of the AEDPA, § 2244(d) began to apply to Moseley on its effective date of April 24, 1996. At that time, Moseley had a motion for appropriate relief pending in the Superior Court. The Middle District concluded that the statute of limitation was tolled while the motion for appropriate relief was being considered by the Superior Court. The time began to run again when the Superior Court denied the motion, and then continued to run until Moseley filed a petition for a writ of certiorari in the North Carolina Supreme Court. At that time, Moseley again had a properly filed application for state post-conviction review pending in state court. Therefore, the limitations period was tolled and did not begin to run again until the Supreme Court of North Carolina denied the petition.

The State also points to various decisions in this district in which the *Moseley* interpretation of § 2244(d) has been applied. For example, the State points out that this court in *Basden v. French,* Order, 5:97-HC-462-F (E.D.N.C. June 30, 1997) (Fox, J.) (unpublished), in an order setting the due date for a habeas

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petition in a capital case stated: "The court is persuaded by the rationale set forth by the Honorable Judge N. Carlton Tilley, Jr. in his May 2, 1997, order adopting the April 14, 1997, order of Magistrate Russell [] A. Eliason in *Moseley v. French* . . . " The State also cites several decisions by other courts in the Eastern District of North Carolina that apply the *Moseley* interpretation of § 2244(d). *See, e.g., Godwin v. G.L. Woodard*, Order, 5:97-HC-632-BO2 (E.D.N.C. Dec. 16,1997) (Boyle, J.) (unpublished); *Johnson v. State of North Carolina*, Order, 5:97-HC-814-BR2 (E.D.N.C. Dec. 18, 1997) (Britt, J.) (unpublished); *Starkie v. Martin*, Memorandum & Recommendation, 5:97-HC-637-H2 (E.D.N.C. Nov. 21, 1997) (Denson, Magistrate J.). The State argues that this court, consistently with the above decisions, should rule that the *Moseley* interpretation of § 2244(d) must be applied in this matter.

Petitioner disagrees. Petitioner's first contention is that the AEDPA does not apply to this case because the petition that was filed on February 2, 1998, was not a new action, but a continuation of Petitioner's habeas proceedings commenced in 1993. Alternatively, even if the February 2, 1998, application was a separate and distinct habeas petition, Petitioner contends that the filing was in compliance with the limitations period codified in § 2244(d). Petitioner argues that the State's construction of the term "pending" is unduly narrow. For purposes of § 2244(d), Petitioner asserts that the term

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"pending" must be understood to encompass the entire post-conviction review process required to exhaust state court remedies, from first filing an application for state post-conviction review through all levels of appellate review, whenever-as here-the state prisoner follows state procedures for filing all papers in a timely manner at each step in the process. Thus, Petitioner argues that the application for post-conviction relief is "pending" during the time between denial of the MAR and the timely filing of the certiorari petition within the time limit allowed by the state rules for capital defendants after receipt of the transcript of trial court proceedings prepared by the State's court reporter. In this case, since Petitioner's MAR was pending continuously in the state court system from a date prior to April 24, 1996, until the denial of the certiorari review by the Supreme Court on February 10, 1997, he contends the one year limitation for filing a habeas application could not expire any earlier than February 10, 1998. Thus, Petitioner's habeas petition, filed on February 2, 1998, was timely.

In support of this argument, Petitioner cites *Allen v. French*, Order, 5:97-HC-959-H (E.D.N.C. Dec. 9, 1997) (Howard, J.) (unpublished). In *Allen*, the Honorable Judge Malcolm Howard addressed the same issue before this court: whether a state death row inmate had timely filed his habeas petition under the AEDPA. In fact, the *Allen* court addressed the same specific point before this court: whether the one year period of limitation of § 2244(d) is tolled during the sixty days

granted to a state criminal defendant under N.C. R. App.R. 21(f) to file a certiorari petition with the North Carolina Supreme Court after a denial of a MAR and the delivery of the MAR transcript to the prisoner. Judge Howard held that the limitations period was tolled during the sixty days granted to the petitioner to file a certiorari petition after his MAR was denied and transcript delivered, and that the petitioner had filed his habeas petition within the one year period of limitations. *See Allen*, 5:97-HC-959-H (E.D.N.C. Dec. 9, 1997), at 4-8.

III.

This court has thoroughly reviewed the parties' various arguments and supporting documents, including the former decisions on this issue by the undersigned and other judges within this district. After much deliberation, the undersigned concludes that Petitioner's habeas petition is untimely under § 2244(d) of the AEDPA.

A. New Action?

As an initial matter, the court disagrees with Petitioner's contention that the AEDPA does not apply to this case because this petition is not a new action, but a continuation of Petitioner's habeas proceeding commenced in 1993. Petitioner's 1993 habeas petition was dismissed by this court because of Petitioner's failure to exhaust his state remedies as

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to several of his claims. *See Taylor v. Dixon*, 93-250-HC-F (E.D.N.C. Nov. 5, 1993). This first petition was not held in abeyance, but *dismissed* without prejudice. *See Rose v. Lundy*, 455 U.S. 509 (1982) (holding that a district court must dismiss a habeas petition, without prejudice, containing unexhausted and exhausted claims). Thus, Petitioner's 1998 habeas petition is not a continuation of the 1993 action, but a newly filed, distinct action, subject to the provisions of the AEDPA.[2] Furthermore, Petitioner's cited authority on this issue is inapposite. The cases Petitioner cites address whether a habeas petitioner may file a second or successive petition under the new provisions of the AEDPA when his first petition was dismissed for failure to exhaust state remedies. None of the cases stands for the proposition that a second petition following a dismissed mixed petition will always be timely under § 2244(d)'s one year limitations period as long as the first petition was filed before the effective date of the AEDPA. Such a holding would thwart the Congressional purpose of enacting a limitations period within which to file a habeas petition. Therefore, the undersigned concludes that the one year limitations period of the AEDPA applies to Petitioner's second petition.

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2 Indeed, Petitioner was advised in an order by the undersigned filed on October 15, 1997, after he sought appointment of counsel by filing a motion in his 1993 action, that the court considered Petitioner's 1993 action to have been dismissed and closed. *See* Taylor v. French, Order, 93-250-HC-F (E.D.N.C. Oct. 15, 1997) (Fox, J.) ("Petitioner must institute a new action, as the instant case is closed.").

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B. Tolling

As to the parties' tolling arguments, § 2244(d) of theAEDPA provides in relevant part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.
>
> The limitation period shall run from the latest of -
>
> (A) the date on which the judgment becomes final by the conclusion of direct review or the expiration of direct review or the expiration of the time for seeking such review; . . .
>
> (2) The time during which a properly filed application for State post-conviction or other collateral reviewwith respect to the pertinent judgment of claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

Courts have differed on how the new statute of limitations affects prisoners whose direct appeal was final before April 24,

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1996. Some courts have allowed a grace period up to one year after the effective date of the new provision in which to file habeas actions challenging their convictions. *See, e.g., Burns v. Morton,* 134 F.3d 109, 111 (3d Cir. 1998); *Flowers v. Hanks,* 941 F. Supp. 765, 771 (N.D. Ind. 1996). Some courts have allowed a federal habeas petitioner a "reasonable time" to file a petition after the effective date of the amendments. *See, e.g, Peterson v. Demskie,* 107 F.3d 92, 93 (2d Cir. 1997). Still other courts have been less generous giving prisoners no grace period in which to file. *Cf. Clarke v. United States,* 955 F. Supp 593, 597 (E.D.Va. 1997) (strictly applying the one-year statute of limitations found in § 2255). This court finds that giving prisoners whose convictions became final before the effective date of the AEDPA one year from that effective date within which to file a habeas petition is appropriate. This court has never addressed in any detail the tolling provision of § 2244(d)(2) as applied to habeas applicants such as Petitioner.

A resolution of the State's motion to dismiss depends entirely upon whether the time during which Petitioner was preparing his petition for writ of certiorari to the North Carolina Supreme Court was tolled from the one-year limitations period of § 2244(d)(1). Petitioner's MAR was denied by the trial court on May 23, 1996. Because Petitioner was convicted before enactment of the AEDPA he was required to file his federal habeas petition within one year of April 24, 1996, the effective date ofthe AEDPA. Without the tolling

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provisions of § 2244(d)(2), Petitioner would have been required to file his petition on or before April 23, 1997. However, any time between April 24, 1996, and April 24, 1997, during which Petitioner had "a properly filed application for State post-conviction or other collateral review. . . pending," is not counted against Petitioner's one year.

In order to determine whether Petitioner's February 2, 1998, habeas application is timely, this court must interpret the word "pending" in § 2244(d)(2). Petitioner argues for a very broad meaning, and the State argues for a narrow one. The State quotes the *Black's Law Dictionary* definition of "pending" which is "unsettled; undetermined; in process of settlement or adjustment. Thus, an action or suit is 'pending' from its inception until the final judgment." BLACK'S LAW DICTIONARY 590 (5th ed. 1983). By this definition, the State urges that the period between the denial of the MAR and the filing of the certiorari petition cannot be considered a period during which any action was "pending" because a final judgment was rendered with the denial of the MAR.

Furthermore, the State points to the language of 28 U.S.C. § 2244(d)(1)(A) which states the one year limitations period may run from: "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for *seeking such review.*" § 2244(d)(1)(A) (emphasis added). The State points to the absence of language tolling the

limitations period during the time for *"seeking review"* of a state post-conviction decision by a lower court in § 2244(d)(2). The State argues that this difference "demonstrates that Congress intended that the direct appeal process and the post-conviction process be treated differently." State's Motion to Dismiss, at 28. According to the State, the wording of 28 U.S.C. § 2244(d)(2) shows that Congress had no intention of authorizing a tolling period that would encompass the time for *seeking review* of a post-conviction decision by a lower state court. *See id.*

The Petitioner argues that because the state certiorari petition is an integral part of the state post-conviction proceeding, once a petitioner has invoked the state remedy of collateral review by properly filing an MAR, the state collateral proceeding is "pending" until either the North Carolina Supreme Court has rendered a decision, or the time for seeking certiorari review has expired. Furthermore, Petitioner argues that counting the time period for filing a certiorari petition by a federal court amounts to "double counting" -once by the state court clocking the 60-day period for filing the state certiorari petition, and once by the federal habeas court toward the limitations period. By counting this period of time against a prisoner, Petition argues, a federal court is essentially reducing the federal habeas limitations period from the full year to only ten months before the prisoner has exhausted his state remedies. Also, Petitioner argues that this method of "double

counting" leaves the federal courts swamped with "contorted arithmetic" problems. Finally, Petitioner argues that a broad interpretation of "pending" promotes one of the principal goals of the AEDPA of encouraging a state prisoner to diligently pursue and exhaust his state remedies before seeking federal habeas review.

The court is frank to say that it finds both arguments compelling. However, the court concludes that the more narrow construction of "pending" advanced by the State better promotes Congress's intent in passing the AEDPA, and is the correct approach. Congess's intent in enacting the limitations period was to "curb the lengthy delays in filing that now often occur in federal habeas corpus litigation, while preserving the availability of review when a prisoner diligently pursues state remedies and applies for federal habeas review in a timely manner." H.R. REP. NO. 104-23 (1st Sess. 1995), at 9-10. The court is persuaded by the State's argument that Congess's wording of § 2244(d)(2), especially when compared with the wording of § 2244(d)(1)(A), evidences Congress intent to toll the period of limitations only while a matter is actually being considered by a state court in order to encourage a prisoner to promptly seek any state appellate review of post-conviction relief denials, and then promptly file for federal habeas review of the state conviction.

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In so holding, the court is mindful that its interpretation of the word "pending" in § 2244(d)(2) applies to both capital and non-capital defendants in North Carolina. Petitioner has noted that under *North Carolina Appellate Rule* 21 (f), a capital defendant must file a writ of certiorari "within 60 days after delivery of the transcript of the hearing on the motion for appropriate relief to the petitioning party." N.C. APP. R. 21(f). However, for non-capital defendants, under the *North Carolina Appellate Rules*, a prisoner need only file a writ of certiorari"without unreasonable delay." N.C.APP.R. 21(c). A broad interpretationof§ 2244(d)(2), allowing a prisoner to file a petition for writ of certiorari "without unreasonable delay" and without the threat of a ticking federal habeas clock, would thwart Congressional intent of curbing the lengthy delays in filing for post-conviction relief, both state and federal.

The court is persuaded by Petitioner's argument that the word "pending" does encompass the period of time between the granting of a state prisoner's request for a transcript of his MAR hearing and the complete delivery of the transcript to the prisoner. The court considers this period to be part of the MAR proceeding. A transcript of the MAR hearing is often a necessary part of the trial court record filed for appellate review. As the Petitioner notes, the time required for the State to prepare and deliver the transcript of the MAR to a state prisoner is a matter completely out of a prisoner's control. Even the most diligent of state prisoners cannot prevent delays

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in the preparation of a transcript of the MAR. Therefore, the court interprets the word "pending" to encompass the time between the *granting* of a request for a transcript of a MAR hearing, and the final delivery of the last portion of the transcript to the state prisoner.

Applying this interpretation of "pending," the undersigned concludes that Petitioner had a properly filed application for state post-conviction relief pending between April 24, 1996 - the effective date of the AEDPA (Petitioner's MAR was not denied until after that date on May 23, 1996) - and August 23, 1996 - the day Petitioner received the last portion of the transcript of his MAR hearing from the state court reporter. Thus, Petitioner's limitation period was tolled for this 121 day period. Furthermore, Petitioner had a properly filed application for State post-conviction relief pending between October 22, 1996 - the date Petitioner filed a petition for writ of certiorari with the North Carolina Supreme Court, and February 10, 1997 - the date the certiorari petition was denied. This period represents an additional 108 days during which Petitioner's limitation period was tolled. Therefore, under the provisions of the AEDPA, Petitioner was required to file his application for habeas review on or before December 9, 1997 - 229 days after April 24, 1997.

Because Petitioner did not file his habeas petition with this court until February 2, 1998, it is untimely. Therefore,

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Petitioner's claims are barred by the statute of limitations of § 2244(d). The State's Motion to Dismiss hereby is ALLOWED, and Petitioner's claims are DISMISSED.

SO ORDERED.

This the 8th day of June, 1998.

/s/
James C. Fox
United States District Judge